

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**

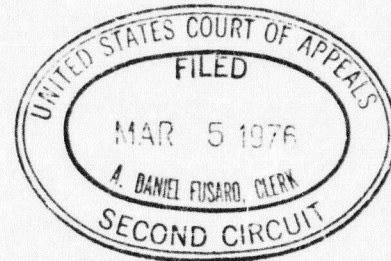




# 76-6024

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

\_\_\_\_\_  
No. 76-6024  
\_\_\_\_\_



UNITED STATES OF AMERICA,

Plaintiff,

-against-

INTERNATIONAL BUSINESS MACHINES  
CORPORATION,

Defendant.

\_\_\_\_\_  
FREDERIC G. WITHINGTON,

Appellant,

-against-

UNITED STATES OF AMERICA,

Plaintiff-  
Appellee.

\_\_\_\_\_  
On Appeal from the United States District Court  
for the Southern District of New York

\_\_\_\_\_  
BRIEF OF APPELLANT, FREDERIC G. WITHINGTON  
\_\_\_\_\_

Of Counsel:  
Robert B. Davidson

BAKER & MCKENZIE  
375 PARK AVENUE  
NEW YORK, NEW YORK 10022



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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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FREDERIC G. WITHINGTON,	:	Docket No. 76-3009
Petitioner,	:	PETITION FOR EXTRA-
-against-	:	ORDINARY WRIT PUR-
	:	SUANT TO 28 U.S.C.
	:	§1651 AND FED. R.
HON. DAVID N. EDELSTEIN, CHIEF JUDGE,	:	<u>APP. P. 21</u>
United States District Court for the	:	
Southern District of New York, UNITED	:	
STATES DISTRICT COURT FOR THE SOUTHERN	:	
DISTRICT OF NEW YORK, UNITED STATES OF	:	
AMERICA, and INTERNATIONAL BUSINESS	:	
MACHINES CORPORATION,	:	
Respondents.	:	

-----X

FREDERIC G. WITHINGTON,	:	Docket No. 76-6024
Appellant,	:	APPEAL FROM AN ORDER
-against-	:	OF THE SOUTHERN
	:	DISTRICT OF NEW YORK
UNITED STATES OF AMERICA,	:	ENTERED DECEMBER 4,
	:	<u>1975</u>
Appellee.	:	

-----X

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT:

Frederic G. Withington seeks a writ of mandamus pursuant to  
28 U.S.C. §1651 and Rule 21, Fed. R. App. P. ordering Chief  
Judge David N. Edelstein, sitting in United States v. Inter-



national Business Machines Corp., 69 Civ. 200, Civ. No. 72-344, now on trial, to vacate an order entered by him on December 4, 1975 denying Mr. Withington's motion to quash and vacate a subpoena served upon him by the United States (the "government"). The government's subpoena directs Mr. Withington to appear at the trial and testify on behalf of the government as its expert witness.

Mr. Withington has proceeded by petitioning for a writ of mandamus because the law in this Circuit appears unsettled as to whether the District Court's order is appealable. Mr. Withington has also filed a Notice of Appeal pursuant to 28 U.S.C. §1291, and this document will serve as the appellant's brief on that appeal as well as his petition for the extraordinary writ.

The Issues Presented and the Relief Sought

This proceeding presents the following issues:

(1) Whether the District Court has the power to compel an expert witness to testify concerning his expert opinion without compensation for his services, absent unusual circumstances such as the unavailability of another expert;

(2) Assuming the power of the District Court to compel an expert to testify in certain circumstances, whether Judge Edelstein misconceived the nature of his discretion and acted



outside the range of his power;

(3) Whether the order of the District Court is appealable;  
and

(4) Whether a writ of mandamus is appropriate.

In the alternative, Mr. Withington seeks either a reversal on appeal of the decision denying the motion or the issuance of a writ of mandamus directing Chief Judge Edelstein (a) to vacate his order denying Mr. Withington's motion to quash and (b) to grant that motion.

#### Statement of Facts

By subpoena dated March 13, 1975 the United States directed Frederic Withington, a consultant employed by Arthur D. Little, Inc. ("ADL"), to appear at the trial of United States v. IBM, a civil action alleging violations of the antitrust laws, and testify on behalf of the government. Mr. Withington, a recognized expert in the computer field, has no knowledge of the facts upon which the government predicates its case, and the government has admitted that his testimony is sought solely in an expert capacity.<sup>1</sup>

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<sup>1</sup> See Affidavit of Grant G. Moy, Jr., sworn to on June 30, 1975, Paragraph 6, set forth in the Appendix hereto, pp. 2A-4A.



Mr. Withington does not wish to make his expert services available to the government in connection with United States v. IBM and accordingly moved on June 23, 1975 to quash the government's subpoena. The reasons which compel Mr. Withington (and his employer) to seek an order quashing the subpoena are explained in Mr. Withington's affidavit, sworn to on May 15, 1975, and in the affidavit of Standish Bradford, Jr., ADL's senior counsel, sworn to on May 16, 1975, both submitted in support of Mr. Withington's motion.<sup>2</sup> Essentially, Mr. Withington contended that (i) as an unwilling expert he could not be compelled to testify against his will, (ii) as an employee of ADL, he should not be compelled to testify concerning proprietary information belonging to his employer and (iii) because ADL performs services for IBM, his testimony would create a conflict of interest.

By memorandum decision filed December 4, 1975, Chief Judge Edelstein denied Mr. Withington's motion to quash.<sup>3</sup> On December

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<sup>2</sup> Mr. Withington's affidavit is set forth in the Appendix hereto, pp. 5A - 12A. Mr. Bradford's affidavit is set forth at pp. 13A - 15A.

<sup>3</sup> Judge Edelstein's decision is set forth in the Appendix hereto, pp. 16A - 24A.



29, 1975 Mr. Withington moved for an order permitting him to file an appeal pursuant to 28 U.S.C. §1292(b). That motion was denied in a memorandum decision by Chief Judge Edelstein filed December 30, 1975.

Reference to Petition and Brief of Felix Kaufman

Felix Kaufman, another unwilling expert subpoenaed by the government is in the same position as Mr. Withington. Mr. Kaufman's motion to quash the government's trial subpoena was denied by Chief Judge Edelstein in a memorandum decision dated December 8, 1975. Indeed, that decision refers to the Court's decision with respect to Mr. Withington filed four days earlier.<sup>4</sup> Mr. Kaufman has filed a Petition and Brief with this Court seeking review of Judge Edelstein's decision. (Petition for Extraordinary Writ Pursuant to 28 U.S.C. §1651 and Fed. R. App. P. 21, Docket No. 76-3008 and Appeal from an Order of the Southern District of New York, Entered December 8, 1975, Docket No. 76-6017). As Mr. Kaufman seeks the identical relief sought by Mr. Withington,

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<sup>4</sup> Judge Edelstein's decision denying Mr. Kaufman's motion to quash is set forth in the Appendix hereto, pp. 25A - 33A.



Mr. Withington respectfully refers this Honorable Court to the Petition and Brief filed by Mr. Kaufman for a recitation of the legal authorities relied upon by the Petitioner and Appellant herein.

Conclusion

For the reasons set forth above, and for the further reasons set forth in the Petition and Brief of Felix Kaufman, Frederic G. Withington respectfully requests this Court to issue a writ of mandamus pursuant to 28 U.S.C. §1651 and Rule 21, Fed. R. App. P., directing Chief Judge David N. Edelstein:

(1) to vacate his order filed December 4, 1975 denying Mr. Withington's motion to quash the government's subpoena, and

(2) to enter an order quashing and vacating the government's subpoena.

In the alternative, Mr. Withington respectfully requests that this Court grant his appeal pursuant to 28 U.S.C. §1291 and reverse the decision of the court below.

Dated: New York, New York  
March 5, 1976

Respectfully submitted,

BAKER & MCKENZIE

By: Robert B. Davidson

Attorneys for Frederic G. Withington  
375 Park Avenue  
New York, New York 10022



NOTICE OF ENTRY

Sir:—Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

**BAKER & MCKENZIE**

Attorneys for

Office and Post Office Address

375 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

**BAKER & MCKENZIE**

Attorneys for

Office and Post Office Address

375 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

To

Attorney(s) for

Index No. 76-6024

Year 19

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

FREDERIC G. WITHINGTON,

Appellant,

-against-

UNITED STATES OF AMERICA,

Appellee.

AFFIDAVIT OF SERVICE

**BAKER & MCKENZIE**

Attorneys for

Office and Post Office Address, Telephone

375 PARK AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10022

PLAZA 1-5700

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

- ☐ Certification  
By Attorney
- ☐ Attorney's  
Affirmation

certifies that the within  
has been compared by the undersigned with the original and found to be a true and complete copy.

shows: deponent is

the attorney(s) of record for  
in the within action; deponent has read the foregoing  
and knows the contents thereof; the same is  
true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief,  
and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

Check Applicable Box

- ☐ Individual  
Verification
- ☐ Corporate  
Verification

the  
the foregoing  
deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as  
to those matters deponent believes it to be true.

the  
a  
foregoing  
is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and  
belief, and as to those matters deponent believes it to be true. This verification is made by deponent because  
is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

is over 18 years of age and resides at

being duly sworn, deposes and says: deponent is not a party to the action.

Check Applicable Box

- ☐ Affidavit  
of Service  
By Mail
- ☐ Affidavit  
of Personal  
Service

On 19 deponent served the within  
upon  
attorney(s) for in this action, at

the address designated by said attorney(s) for that purpose  
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official  
depository under the exclusive care and custody of the United States Postal Service within the State of New York.

On 19 at upon

herein, by delivering a true copy thereof to h personally. Deponent knew the  
person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on

19

The name signed must be printed beneath



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

FREDERIC G. WITHINGTON,

Appellant,

-against-

UNITED STATES OF AMERICA,

Appellee.

: Docket No. 76-6024

:

: AFFIDAVIT OF SERVICE

:

:

STATE OF NEW YORK )

) ss.:

COUNTY OF NEW YORK )

CLAUDIA J. GILMAN, being duly sworn, deposes and says:

1. I am not a party to the action. I am over the age of 18 years and reside at 540 West 112th Street, New York, New York. On March 5, 1976, I personally served the Brief of Appellant, Frederic G. Withington and the Appendix relating thereto upon Raymond Carlson, Esq. United States Department of Justice, Antitrust Division, One St. Andrew's Plaza, New York, New York and Cravath Swaine & Moore, One Chase Manhattan Plaza, New York, New York, attorneys for the plaintiff and the defendant in the action entitled United States of America v. International Business Machines Corporation, 69 Civ. 200 (D.N.E.).

Claudia J. Gilman  
CLAUDIA J. GILMAN

Sworn to before me this  
5th day of March, 1976

Robert B. Davidson

Notary Public  
ROBERT B. DAVIDSON  
Notary Public, State of New York  
No. 31-4500638  
Qualified in New York County  
Commission Expires March 30, 1977